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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1715

LOUIS MICHAEL PARRISH, LARRY J. WADINO AND KATHY LYNN CALDWELL,
Petitioners

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on March 31, 1980.

OPINIONS BELOW

The rulings of the District Court for the Eastern District of Virginia at Alexandria are not reported. The opinion of the Court of Appeals of the Fourth Circuit which affirmed the judgment of the District Court for the Eastern District of Virginia, is printed in the Appendix hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on March 31, 1980. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court committed error in its instructions to the jury by treating the testimony of accomplices as establishing the commission of the crimes charged in the indictment, and thus withdrawing such issues from the jury's consideration.

2. Whether the Court committed error in instructing the jury that a key government witness' prior inconsistent statements before the grand jury were admissible only for purposes of impeachment and not as substantive evidence.

3. Whether the Mann Act, 18 U.S.C. § 2421, which prohibits the transportation of women and girls only, creates on its face a sexual classification forbidden by the Fifth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments.

STATEMENT OF THE CASE

These are consolidated appeals from judgments of conviction and commitment entered in the United States Court of Appeals for the Fourth Circuit on March 31, 1980. The petitioners are Louis Michael Parrish, Larry J. Wadino and Kathy Lynn Caldwell. The three petitioners were convicted of various counts dealing with conspiracy, 18 U.S.C. § 371; to violate the Mann Act, 18 U.S.C. § 2421; conspiracy to violate the statute prohibiting the interstate travel in aid of racketeering (ITAR), 18 U.S.C.

§ 1952(a)(3); and violations of the substantive crimes themselves.

Louis Michael Parrish was sentenced to a five-year term of imprisonment. Larry J. Wadino was sentenced to a three-year term of imprisonment and Kathy Lynn Caldwell was sentenced under the Youth Corrections Act.

REASONS FOR GRANTING THE WRIT

This petition raises substantial questions concerning the role of the trial judge in jury trials. The effect of the judge's erroneous decision was to withdraw essential elements of the criminal offense from the jury's consideration and thereby deny petitioners their Sixth Amendment guaranty to a jury verdict on all the issues.

The lower court's decision should also be reviewed because it is in conflict with the Federal Rules of Evidence approved by this Court. The ruling of the trial judge was recognized as error by the Fourth Circuit but deemed harmless. That conclusion however is itself erroneous, because it misstates the purpose of Rule 801(d)(1)(A).

Finally, the writ should be granted because the Mann Act, 18 U.S.C. § 2421, which prohibits the transportation of women and girls only, creates on its face a sexual classification forbidden by the Fifth Amendment.

I

In his instructions to the jury, the trial judge acted as fact finder when he told the jury that the accomplice testimony – which was the heart of the case – was "admitted." The trial judge was requested pursuant to Rule 30 of the Federal Rules of Criminal Procedure to correct his instruction, but this was denied. The effect of the instruction was to direct a verdict on an essential element of the case, thereby withdrawing that material issue from the

jury and denying the petitioners their Sixth Amendment rights.

This Court has long held that a trial judge must not withdraw any of the material facts from the jury's consideration and that to do so is a violation of the criminal defendant's fundamental rights, entitling him to a new trial. See, e.g., *United Brotherhood of Carpenters v. United States,* 330 U.S. 395 (1947); *Quercia v. United States,* 289 U.S. 466 (1933); *Horning v. District of Columbia,* 254 U.S. 135 (1920). Relying on this authority, the federal courts have held that a trial judge may not, in commenting on the evidence, state as proven fact, rather as evidence which they are to consider, the substance of the government's case. *Hardy v. United States,* 118 U.S. App. D.C. 253, 335 F.2d 288 (1964). Nor may the trial court instruct the jury that there is only one issue for them to consider, such as identification of self defense, excluding the issue of whether the government has proved all the elements of the offense beyond a reasonable doubt. *United States v. Hayward,* 136 U.S. App. D.C. 300, 420 F.2d 142 (1969). Likewise, the trial court may not altogether omit an instruction on any element of the offense. *United States v. Harris,* 346 F.2d 182 (4th Cir. 1965); *Byrd v. United States,* 119 U.S. App. D.C. 360, 342 F.2d 939 (1965). For the same reason, a conviction must be reversed if the trial court's instruction incorrectly defined an element of the offense. *Jackson v. United States,* 121 U.S. App. D.C. 160, 348 F.2d 772 (1965).

The underpinning of the aforementioned cases is the fundamental right of the defendant in a criminal case to have the question of his guilt determined solely by the jury. *Duncan v. Louisiana,* 391 U.S. 145 (1968). Implicit in this fundamental right is the notion that the jury will hear evidence, receive instructions from the court, weigh

the credibility of witnesses, and then decide all the relevant issues of fact. By instructing the jurors that the facts testified to by accomplices were entitled to greater believability and that indeed the accomplices had "admitted" the offense, the judge below effectively withdrew from their consideration a number of vital facts which went to the very essence of the jurors' function.

The vice of the instruction by the judge below was twofold. Not only did it deny the defendant a jury verdict on the essential issue of whether the crime – "admitted" – had indeed been committed, it also conflicted with the presumption of innocence. See, e.g., *United States v. Meisch,* 370 F.2d 770 (3rd Cir. 1966); *McMillen v. United States,* 386 F.2d 29 (1st Cir. 1967); *United States v. Persico,* 349 F.2d 6 (2nd Cir. 1965).

Finally, it is impossible to conclude that the error was harmless inasmuch as it related to an essential element of the crime. By entering a plea of not guilty, the petitioners put the government to its burden on all the issues and were entitled to a jury verdict on all the issues. The petitioner never affirmatively conceded the issue that the instruction found to be "admitted," that is, whether the crime had been committed. Additionally, the error is compounded when one considers the impact of a judge's instruction:

> The influence of a trial judge on a jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling."

Quercia v. United States, supra, 289 U.S. at 470. Finally, when an objection is made under Rule 30 and defense counsel identifies the problem immediately, it is unfair to the defendant to leave the error uncorrected.

II

At trial, the government's case in large part was predicated on the testimony of Clyde B. Stovall, an accomplice who, as noted, had his testimony endorsed by the court. Stovall, prior to trial, had testified before the grand jury and given testimony which was in conflict with his testimony at trial. When cross examined, Stovall was directed to his sworn grand jury testimony and asked questions. Before the actual grand jury testimony was read to him, the trial court, anticipating the line of questioning to follow, interrupted and on its own initiative instructed the jury that the prior inconsistent testimony could only be used in assessing the credibility of Stovall. Defense counsel informed the court that this ruling was erroneous and that the defendants were entitled to have the prior inconsistent testimony considered as substantive evidence. On appeal, the trial court's decision was recognized as error but viewed as harmless "because the grand jury testimony was only arguably (and not plainly) inconsistent with the testimony at trial and second, because the claimed inconsistency served, as a practical matter, only to impeach the general credibility of the witness, as the district judge permitted." *United States v. Louis Michael Parrish,* No. 79-5138, (decided March 31, 1980) Slip op. at 3-4.

In transmitting the Federal Rules of Evidence to Congress for enactment, this Court endorsed the new provisions which govern proceedings in the courts of the United States. One of the most significant changes is Rule 801(d)(1)(A) which allows the substantive use of evidence if the declarant is available for testimony and subject to cross examination and if the statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding . . . ." "Other proceedings" include the grand jury. See, e.g., *United States v. Morgan,* 555 F.2d

238 (9th Cir. 1977). See also Silbert, *Federal Rule of Evidence 801 (d)(1)(A),* 49 Temple L. Q. 880 (1976); *Rothstein, Federal Rules of Evidence,* 335 (1978).

The Circuit Court's conclusion that the error was harmless given the fact that the testimony served only to impeach misses the very purpose of the rule. A limiting instruction by the trial court directly tells the jury that the evidence cannot be considered for substantive purposes and in effect has a limited significance. In fact, the significance of Rule 801(d)(1)(A) goes well beyond impeachment and allows the jury to view the evidence as substantive proof that the offense did not occur. If the Fourth Circuit ruling were allowed to stand, Rule 801(d)(1)(A) would be reduced to exactly what the rules of evidence provided before the rule was promulgated.

III

The Mann Act, which became law in 1910, makes it a crime to "knowingly transport . . . any *woman or girl* for the purpose of prostitution . . . ." 18 U.S.C. § 2421 (emphasis added). In thus creating on its face an impermissible sexual classification, the Act clearly violates the equal protection guaranty of the Fifth Amendment to the Constitution of the United States.

The Mann Act does treat men and women equally insofar as members of both sexes may be convicted under it, but the mere fact of equal application – in the context of the statute containing a sexual classification will not save the statute from attack on equal protection grounds. The language of the statute is plain and unequivocal and allows for a gender classification that this Court has long held to be unacceptable. See, e.g., *Frontiero v. Richardson,* 411 U.S. 677, 682-88 (1973); *Califano v. Westcott,* ____ U.S. ____, 61 L. Ed. 2d 382, 99 S. Ct. _____ (1979).

The "white slave traffic act" was written in an age when classification in terms of race and gender were acceptable. To be sure, the Act rests upon the view that "[white] women and girls [are compelled] against their will and desire to enter and continue in a life of prostitution." S. Rep. No. 886, 61st Cong., 2d Sess. 10 (1910). The Act's gender based classification "rest[s] only upon 'old notions' that 'are archaic and overbroad' generalizations . . . and so . . . offend[s] the prohibition against denial of equal protection of law." *Califano v. Goldfarb,* 430 U.S. 199, 211 (1977).

Whatever merit these views may have had in 1910, such "assumptions that women are 'the weaker sex'," *Califano v. Webster,* 430 U.S. 313, 317 (1976), "are more consistent with 'the role-typing society has long imposed,' . . . than with contemporary reality." *Califano v. Goldfarb, supra,* 430 U.S. at 207 (citations omitted). As such, it is inconceivable that the Supreme Court would say today, as it did in 1960, that "it is not for us to reexamine the basis of the supposition that the women with whom [the Mann Act] sought to deal often had no independent will of their own and . . . must be protected against themselves." *Wyatt v. United States,* 362 U.S. 525, 530 (1960).

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

JACOB A. STEIN,
JOHN M. DOWD
RICHARD S. COOPER
Attorneys for Petitioners

APPENDIX

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 79-5137

UNITED STATES OF AMERICA,
Appellee,

v.

LOUIS MICHAEL PARRISH,
Appellant.

No. 79-5138

UNITED STATES OF AMERICA,
Appellee,

v.

LARRY J. WADINO,
Appellant.

No. 79-5139

UNITED STATES OF AMERICA,
Appellee,

v.

KATHY LYNN CALDWELL,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, Senior District Judge.

Argued March 6, 1980 Decided March 31, 1980

Before WINTER, BUTZNER, and PHILLIPS,
Circuit Judges.

Jacob A. Stein for Appellant Louis Michael Parrish; John M. Dowd for Appellant Larry J. Wadino (Richard S. Cooper on brief) for Appellant Kathy Lynn Caldwell; (Charles Morgan, Jr. and Pamela S. Horowitz on brief) for Appellants; Paul N. Murphy, Assistant U.S. Attorney (Justin W. Williams, U.S. Attorney, Henry E. Hudson, Special Assistant U.S. Attorney on brief) for Appellee.

PER CURIAM:

Convicted of conspiracy and for violations under the Mann Act, 18 U.S.C. § 2421, and the Travel Act, 18 U.S.C. § 1952, defendants appeal. We see no reversible error and we affirm.

When the charge of the district court to the jury is read as a whole, we do not think that the district court removed the issue of witness credibility from the jury when it referred to "admitted" accomplices in telling the jury that the testimony of such witnesses should be viewed with caution.

We do think that there was error on the part of the district court in declining to admit, as substantive evidence, the testimony of a witness before the grand jury; the district judge admitted it only for the purpose of impeachment. Under Fed. R. Evid. 801(d)(1)(A) the grand jury testimony was admissible as substantive evidence. The error here, however, was harmless – first, because the grand jury testimony was only arguably (and not plainly) inconsistent with the testimony at trial and second,

because the claimed inconsistency served, as a practical matter, only to impeach the general credibility of the witness, as the district judge permitted.

We think that the affidavit upon which the search warrant was issued established probable cause for the issuance of the warrant. The allegations about the claimed inaccuracies or untruths in the affidavit did not meet the test prescribed by Franks v. Delaware, 438 U.S. 154 (1978), so as to warrant a suppression hearing and suppression of the fruits of the search.

As to the defendant Wadino, we think the evidence sufficient to convict him of conspiracy to violate the Mann Act and of several specific violations of that statute. The newspaper article which was published while the deliberations of the jury were in recess was not sufficiently prejudicial to require a *voir dire* of the jurors. The constitutional challenges to the Mann Act and the Travel Act are insubstantial.

AFFIRMED.